No. 79-2084

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In the Supreme Court of the United States

OCTOBER TERM, 1979

SAN ANTONIO PORTLAND CEMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED CEMENT, LIME AND GYPSUM WORKERS INTERNATIONAL UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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v.

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QUESTION PRESENTED

Whether the Board properly refused to set aside a representation election because of the pro-union activities of two alleged supervisors.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 611 F. 2d 1148. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. B) are reported at 240 N.L.R.B. No. 163, and the Hearing Officer's Report and Recommendation on Objections to Conduct of Election and Challenged Ballots in the related representation proceeding (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D) was entered on March 10, 1980, and the Company's petition for a rehearing (Pet. App. E) was denied on April 8, 1980. The petition for a writ of certiorari was filed on June 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* are set forth at Pet. 2.

STATEMENT

On January 12, 1978, the United Cement, Lime and Gypsum Workers International Union, AFL-CIO, filed a representation petition with the Board seeking certification as the bargaining representative of all production and maintenance employees employed by the San Antonio Portland Cement Company at its Cementville plant. In the ensuing election held on March 17, 1978, 98 employees voted for the Union and 72 against. 39 additional ballots were challenged (Pet. App. B-3; R. 307).[1] The Company filed objections to the election,

[1] "R." refers to the transcript of the proceeding before the hearing officer and to the consecutively paginated "Volume II Pleadings" filed in the court of appeals.

alleging that supervisory personnel assisted the Union in its organizational activities (Pet. App. B-3 to B-4; R. 309-311), and a hearing was ordered to review these objections and the challenges ballots (Pet. App. B-4; R. 313-315).

At the hearing, the Company and Union stipulated that a number of the challenged ballots were cast by supervisors and were therefore invalid; since the remaining challenged ballots were insufficient to affect the election results, it was unnecessary to resolve the challenge (Pet. App. B-4).

As to the election objections, the following evidence was adduced. Gregory Fuentes, who was classified as a carpenter and utility leadman, worked on a crew of three or four men responsible for maintaining residential housing made available to employees by the Company (Pet. App. A-3; R. 64-65, 193, 195). The crew members reported to the plant superintendent each morning at which time they picked up an assignment sheet listing the day's work. Each of the members of the crew was skilled in a construction trade—Fuentes was a carpenter—and they generally divided up the assigned work based on their skills. As the work was completed, a crew member marked off the job on the sheet (Pet. App. A-3; R. 97, 193-194, 202-204).

Fuentes spent all of his time while on the crew performing manual labor (Pet. App. A-3; R. 193-194). He was the highest paid member of the crew by 13 or 14 cents and received the same benefits as the other hourly paid employees (Pet. App. A-3; R. 121, 213). Fuentes never hired, fired, laid off or recalled other employees. He could not adjust employees' grievances or grant them time off (Pet. App. A-3; R. 198-199, 211-213, 230-231). The Company did not require that Fuentes evaluate his fellow crew members for wage increases or promotions. However, Fuentes did tell his supervisor that a particular

crew member was an outstanding worker, and that employee subsequently received a wage increase based on the recommendation of the plant superintendent. In order to obtain additional labor for the crew, Fuentes appealed to the plant superintendent who either approved or denied the request (Pet. App. A-3 to A-4; R. 123, 206-207).

The Company operates on a 24-hour basis a 12-engine power plant to supply electricity for its operations (Pet. App. A-4). Joe Fernandez, who had worked in the power plant for 13 years at the time of the representation election, was chief diesel engine operator and as such was responsible for running four large diesel engines and assisting other operators in starting their machines and running them properly (Pet. App. A-4 to A-5; R. 80, 250-251, 274, 278). Fernandez spent all of his time engaged in manual labor, performing such tasks as checking lubricators and oil levels, cleaning the generator pits and oil spills, assisting the maintenance crew, and performing other minor clean-up chores (Pet. App. A-5; R. 274-278). When an engine was in extreme danger of damage, Fernandez could make an on-the-spot decision to shut it down, as could other operators and mechanics (Pet. App. A-5; R. 262-263, 288-289).

While other operators on occasion called Fernandez at home for his advice, Fernandez did not have authority to direct the other operators' work (Pet. App. A-5; R. 262, 286). He had no authority to hire, discharge, promote, or discipline employees, and did not participate in preparing employees' work schedules (Pet. App. A-5; R. 260-262).

Based on these facts, the Hearing Officer concluded in a decision affirmed by the Board (R. 377) that neither Gregory Fuentes nor Joe Fernandez was a supervisor as defined in the Act, and that therefore their pro-union activity did not preclude a fair election. The Hearing Officer noted that Fuentes did not possess or exercise the

authority to hire or fire, lay off, recall, promote or discipline employees, nor could he effectively recommend such action. Further, Fuentes did not have the authority to assign or direct the work of others. Thus, Fuentes was only a leadman acting as a conduit for the plant superintendent in assigning and directing work (Pet. App. C-7 to C-8).

As for Joe Fernandez, the Hearing Officer found that he did not have the authority to direct the work of other employees. Rather, his main responsibility was the maintenance of diesel engines. The mere fact that he could make a judgment to shut off an engine to preserve the equipment did not cloak him with supervisory authority (Pet. App. C-9).[2]

The Board certified the Union (Pet. App. B-8), the Company refused to bargain in order to challenge that certification (*ibid.*), and the Board, after finding that the refusal violated Sections 8(a)(5) and (1) of the Act, issued a bargaining order (Pet. App. B-11 to B-13). The court of appeals sustained the Board's findings and enforced its order (Pet. App. A-1 to A-7).

ARGUMENT

The sole issue raised by the petition is whether the court of appeals erred in refusing to upset the Board's resolution of conflicting testimony.[3] That issue does not warrant review by this Court.

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[2]The Hearing Officer also found that a third individual was a supervisor but that his pro-union activity, which consisted of wearing a union button on one occasion, did not coerce employees into supporting the Union (Pet. App. C-9 to C-10).

[3]The Company's contention (Pet. 10) that the Board's decision, as approved by the court of appeals, "is at variance with the great body of case law dealing with supervisory status" is based on testimony discredited by the Hearing Officer and on an erroneous view of the record.

It is well established that under the National Labor Relations Act credibility determinations are matters for the trier of fact that should not be upset by a reviewing court in the absence of extraordinary circumstances. See, *e.g., NLRB* v. *Pittsburg S.S. Co.*, 337 U.S. 656, 659-660 (1949); *Helena Laboratories Corp.* v. *NLRB*, 557 F. 2d 1183, 1187 (5th Cir. 1977). No such circumstances are present here. The Hearing Officer carefully considered all the conflicting evidence and his conclusions based on that evidence are amply supported by the record.[4]

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[4]In crediting Gregory Fuentes over Company personnel manager Manuel Galindo, the Hearing Officer explained that Fuentes was more familiar with the repair crew's day-to-day operations than was the personnel manager (Pet. App. C-8 n.3). In addition, the Hearing Officer relied on the fact that Fuentes' immediate supervisor, who testified at the hearing, did not refute Fuentes' testimony (Pet. App. C-8). In the case of Joe Fernandez, although personnel manager Galindo made numerous conclusory assertions regarding Fernandez exercise of supervisory authority, he was unable to describe any specific instances of such conduct (R. 82, 83-84, 102-106, 113-115). That failing is understandable in view of the fact that Fernandez had had personal contact with Galindo on only two occasions and had see him in the powerhouse only "5 to 10 times" during his 13-year employment (R. 254).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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